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No. 92-1180

In the
Supreme Court of the United States
October Term, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

CHRISTOPHER J. YUEN, ESQ.
Attorney for Respondent

Hilo Lagoon Centre
101 Aupuni Street, Suite 108
Hilo, Hawaii 96720
(808) 935-4429

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

1. The government is attempting to forfeit a four-acre parcel of land owned by James Good, including his home, four and a half years after the discovery of marijuana on the property by local police and four years after Good's criminal conviction in state court.

Good purchased the property on December 12, 1978, and October 4, 1982. (R. 29, Ex. "A"-"B".) (The land originally consisted of two parcels which were consolidated into one. R. 33, Ex. "C".)

On January 31, 1985, local police, accompanied by an IRS agent, executed a search warrant on Good's property and found eighty-nine pounds of marijuana, mostly in a workshop separate from the house, vials containing thirty-three grams of hashish oil, marijuana seeds, and currency. (R. 1; R. 29, Ex. "I"; Pet. App. 3a.)

Good was charged with promoting a harmful drug in the second degree in a criminal complaint issued in the Third Circuit Court, State of Hawaii, on June 4, 1985. (R. 29, Ex. "D"; Pet. App. 3a.)

Good pleaded guilty to the charge on July 3, 1985. (R. 29, Ex. "E"; Pet. App. 3a.) He was pronounced guilty and sentenced on August 7, 1985. (*Id.*) Good was placed on five years' probation, fined $1,000, and ordered to serve one year in jail. (*Id.*) Good also forfeited $3,187.00 in cash found on the premises in a state court forfeiture action. (*Id.*; R. 45, Ex. "B".)

2. By August, 1989, Good was performing satisfactorily in his probation, and had completed all of the special terms of his probation. (R. 29, Aff. of Eva Metz.) But on August 8, 1989, four years, six months and eight days after the original search, the United States filed a complaint for forfeiture against Good's property in the district court. (J.A. at 11-13.) A "Notice of Pending Action" was also filed. (R. 3.) On August 8, 1989, a court clerk issued a "Warrant of Arrest" which directed the United States Marshal to seize the property and detain it until further order of the court. (J.A. at 15-16.)

On August 18, 1989, a magistrate signed a warrant authorizing the seizure of the property, which commanded the marshal to:

> seize the property... and make the seizure and leave a copy of this warrant. You are also commanded to enter into upon the defendant property... for the purpose of

> appraising the value of the property, photographing and inspecting the interior of any appurtenances and improvements, including any dwelling, and to ensure the condition of the premises and to ensure the absence of any safety hazards, and to prepare a written inventory of the property seized. (J.A. at 28.)

The warrant was issued *ex parte* on the strength of an affidavit filed by DEA agent Robert Aiu, which described the items seized by the police in January, 1985, and which recounted events leading up to the 1985 search. (R. 29, Ex. "F".) On August 21, 1989, U.S. Marshals posted the property, and entered and searched the home. (*Id.*, Ex. "G"; Pet. App. 3a.)

Although the dwelling on the property was Good's normal residence, it was temporarily being rented to tenants for $900.00 per month while Good worked in Central America for a charitable organization, Project Christ the King. (R. 29, Ex. "G"; R. 37, Ex. "A"; R. 33, Ex. "B" at 12.) Good had lived in the home from 1980 until April, 1987, and Good had stayed in the home during his return visits to Hawaii (most recently in September - October, 1988). (R. 33, Ex. "A" at 3.)

Good had no prior notice of the seizure and no opportunity to be heard before the seizure. (R. 29; Pet. App. 12a.)

The government allowed Good's tenants to remain in possession under an occupancy agreement but ordered them to make their rental payments to the government. (R. 29, Ex. "G".) The government was willing to allow Good to resume occupancy under an occupancy agreement during the pendency of the forfeiture proceedings, but he could not because of his commitment to work abroad for the charitable organization. (R. 29, affidavit of Christopher J. Yuen.)

The forfeiture action was based entirely on 21 U.S.C. §881(a)(7), which allows the forfeiture of real property "used,

or intended to be used," to commit or to facilitate the commission of a violation of the Controlled Substances Act punishable by more than one year's imprisonment. The government has not alleged that the real property constituted proceeds of drug transactions. (J.A. at 11-13.) Good filed an answer and a verified claim on October 18, 1989, asserting that he was the rightful owner of the property, and stating a number of defenses, including claims that he had been deprived of his property without due process of law and that the forfeiture had not been timely commenced. (J.A. at 17-26.) Good filed a motion for summary judgment on July 13, 1990, arguing that the forfeiture was untimely, that his due process rights had been violated by the *ex parte* seizure, and that the forfeiture constituted a second punishment in violation of the Double Jeopardy Clause. (R. 29; Pet. App. 3a-4a.) Good also argued that 19 U.S.C. §1615, which requires the claimant to shoulder the burden of proof, and the fact that the government need not prove its case beyond a reasonable doubt, both violated due process. Good also filed a motion to exclude the evidence obtained during the January 1985 search on the basis that the affidavit in support of the 1985 warrant had not specified the time when the alleged illegal activities had been observed. (*Id.*, R. 30.)

The district court denied both motions. (R. 47; R. 52.) It granted the government's motion for summary judgment. An order declaring the property to be forfeited to the government was entered on October 3, 1990. (J.A. at 30.)

Good appealed the judgment. The court of appeals reaffirmed in part, reversed in part, and remanded for further proceedings.

3. The court of appeals first held that the forfeiture action was untimely and should be dismissed if, on remand, Good proved that the FBI or DEA had not acted promptly to commence forfeiture against the property after learning of

grounds for forfeiture. The court of appeals' holding was based upon customs laws made applicable to the forfeiture by 21 U.S.C. §881(d).

The court found that the plain language of 19 U.S.C. §1602-1604 commanded government agents to institute forfeitures promptly after discovering violations. The court of appeals rejected the government's argument that these provisions only applied when property had already been seized. It held that these provisions bound DEA and FBI agents —those authorized to make seizures under the Controlled Substances Act — to promptly report violations of the law implicating potential forfeitures to the United States attorney, and for the United States attorney to promptly institute forfeiture if the circumstances so warranted.

Although an IRS agent had been present during the search of Good's home, the court of appeals decided that his knowledge did not trigger the prompt action requirement because IRS agents are not authorized to seize property or report drug offenses. Because the government had refused to answer interrogatories on the issue, the record did not demonstrate when DEA or FBI personnel learned of the grounds for forfeiture. The court of appeals remanded the case to the district court for this determination.

The court of appeals held that the five-year statute of limitations in 19 U.S.C. §1621 was an outer time limit and did not authorize the government to seek forfeiture at any time during the five-year period. Rather, 19 U.S.C. §1602-1604 imposed a separate timeliness obligation.

The court of appeals, without analysis, rejected Good's other timeliness argument, which followed the concurring opinion in *United States v. Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988) (Ferguson, J., concurring), *cert. denied*, 493 U.S. 954 (1989).

The court of appeals also held that the seizure of Good's home under 21 U.S.C. §881 violated the Due Process Clause because the statute did not provide for notice and an opportunity for a hearing before the seizure. The court distinguished cases which upheld the seizure of personal property for forfeiture without prior notice and hearing because these all involved property that was easily moved. Applying the balancing text of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court held that the importance of the home, and the fact that the property would still be available for forfeiture after a hearing, tipped the balance in favor of providing notice and a hearing. It further noted that government's interest in preventing transfer of the property could be achieved by a *lis pendens* and other means less restrictive of Good's rights than outright seizure.

The court declined to consider Good's facial challenge to 21 U.S.C. §881 because it found the seizure unconstitutional as applied. It also held that the property could still be forfeited despite the illegal seizure, but that Good was entitled to the rents that accrued during the illegal seizure.

The court rejected Good's Double Jeopardy and Fourth Amendment claims without discussion.

SUMMARY OF ARGUMENT

I. The seizure of Good's home four and a half years after marijuana was found during a police search, without prior notice or an opportunity for hearing, violated Good's rights under the Due Process Clause, because this court has consistently held that a property owner must be given prior notice and an opportunity to be heard before the government takes away significant property rights, unless "extraordinary circumstances" exist which justify postponing the hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972); *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983).

This court applies the three part balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) when a property owner claims a right to an adversarial hearing before the government takes the owner's property, even temporarily. The *Mathews v. Eldridge* test balances: (1) the significance of the owner's interest; (2) the risk that there will be an erroneous taking of property under the procedures used; and (3) the government's interest in avoiding a hearing. All three factors demonstrate the need for an adversarial hearing in this case.

First, Good suffered a grievous loss — the government seized his home and four acres of land.

Second, erroneous deprivations are likely under the *ex parte* procedure. The court hears only the government's evidence of illegal use; claimants cannot present evidence of innocent ownership or other valid defenses to forestall seizure. It is especially important to allow owners a chance to contest the seizure because the real property forfeiture statute is so vague and sweeping, and is enforced by officials who may have selfish interests in seizing properties.

Third, the government has demonstrated no need to seize without a hearing. It was not in a rush to seize the property: it waited for fifty-four months to file the action. The government's *post hoc* excuses for not providing a hearing — that the owner might destroy the property, that seizing agents might be at risk if the owner knew they were coming, and that a claimant might exploit a hearing to obtain discovery — cannot survive scrutiny. The government typically allows occupants to remain after seizure, so they could still destroy the property. Seizing agents were in no danger from Good or his tenants, and there is no proof that an owner is more likely to violently oppose a seizure after being given a judicial hearing than if seizing agents storm the property without warning. A pre-seizure hearing adds nothing to the ability of claimants to obtain dis-

covery — they already have that right in a forfeiture case, and the court can control the extent of a pre-seizure hearing.

Although this court has held that no prior notice or hearing were required when a yacht was seized for forfeiture in *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663, 678-80 (1974), that case presented entirely different issues than a real property forfeiture. The *Calero-Toledo* court held that the government had an overriding interest to seize without prior notice because *in rem* jurisdiction could not attach if the owner took the opportunity presented by prior notice to sail away with the *res*. Obtaining *in rem* jurisdiction is never a problem in a real property case. Even after a hearing, the property will be there to be seized, and "seizure" can be accomplished simply by posting the property and leaving the process with the occupant, without other interference with the owner's rights. 21 U.S.C. §881(b); Rule E(4)(b), Supplemental Rules for Certain Admiralty and Maritime Claims; *United States v. TWP 17 R 4, Certain Real Property In Maine*, 970 F.2d 984, 989 (1st Cir. 1992).

The government devotes most of its brief to the argument that the court should discard the *Mathews v. Eldridge* test entirely in this action and hold that the Fourth Amendment alone is the procedural guide for governmental takings of property "for law enforcement purposes" (which the government never defines.) The government wants to follow only the procedures used for a search warrant — an *ex parte* judicial determination of probable cause — whenever it seizes property "for law enforcement purposes." Notice and an opportunity for a hearing — the "core requirements" of the Due Process Clause — would never be needed, no matter how vital the owner's interests or how weak the government's need for urgent seizure.

The Fourth Amendment was primarily intended to protect privacy rights, not property. *Camara v. Municipal Court*, 387

U.S. 523, 528 (1967). The limited protections which the Fourth Amendment does give to property do not eliminate the more general protections independently provided by the Due Process Clause of the Fifth Amendment.

Search warrants authorize the seizure of evidence, contraband, weapons and the like under circumstances where a prior adversarial hearing might easily lead to their concealment. Procedures adequate for search warrants were never intended for seizure warrants covering homes and land.

II. 19 U.S.C. §1602-1604 command the government's agents, in the plainest possible language, to initiate judicial forfeitures "promptly," "forthwith," and "without delay" after learning of violations. Good's home and land were not subject to administrative forfeiture, so the statute required the prompt commencement of the forfeiture action.

Because forfeiture is a peculiarly harsh sanction, the government must follow the strict letter of the law in carrying out the forfeiture, or it should be dismissed.

Public policy also supports a requirement that forfeitures be promptly commenced. Otherwise, the government will continue to dredge up and prosecute stale cases like Good's. Because of the overwhelmingly punitive nature of 21 U.S.C. §881(a)(7), and its potential for abuse, the court should strictly enforce the limits in 19 U.S.C §1602-1604.

ARGUMENT

I. THE SEIZURE OF GOOD'S HOME VIOLATED THE DUE PROCESS CLAUSE BECAUSE "EXTRAORDINARY CIRCUMSTANCES" DID NOT EXIST TO PERMIT THE SEIZURE WITHOUT NOTICE AND HEARING.

A. Due Process Normally Requires Notice and an Opportunity To Be Heard Before a Significant Property Deprivation.

The Due Process Clause of the Fifth Amendment requires that a property owner be given notice and an opportunity to be heard before the government takes his or her property, unless extraordinary circumstances exist which allow the government to postpone notice and a hearing. *Fuentes v. Shevin*, 407 U.S. 67, 90-91 (1972); *United States v. $8850*, 461 U.S. 555, 562 n. 12 (1983). Because Good had no prior notice or opportunity to be heard, and no extraordinary circumstances existed, the seizure of his home violated the Due Process Clause.

Notice and an opportunity for hearing are the very core of due process. "[T]he 'root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant interest.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Notice and an opportunity to be heard have long been recognized as the central elements of due process. In *Hovey v. Elliot*, 167 U.S. 409, 415-417 (1896), the court traced the prohibition against taking property without notice and an opportunity to be heard to the Magna Charta and the common law of England. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863). This court has insisted upon notice and an opportunity to be heard before the deprivation of significant property rights, absent extraordinary circumstances, in a long line of cases. *Baldwin v. Hale; Hovey v. Elliot; Grannis v. Ordean,*

234 U.S. 385, 394 (1914); *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Armstrong v. Marzo*, 380 U.S. 545, 552 (1965); *Boddie v. Connecticut*; *Fuentes v. Shevin*; *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *Connecticut v. Doehr*, 111 S.Ct. 2105, 2111 (1991).

The opportunity for a hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Marzo*. This means a hearing before property is taken away — even temporarily. *Fuentes v. Shevin*; *Boddie v. Connecticut*.

B. No "Extraordinary Circumstances" Were Present to Allow the Government to Avoid a Hearing.

A narrow exception exists to the requirement for a pre-seizure hearing: the hearing may be postponed under "extraordinary circumstances," which are "truly unusual." *Fuentes v. Shevin*, 407 U.S. at 90.

This court has also utilized the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. at 335, to determine whether a pre-deprivation hearing must be held. The application of the *Mathews v. Eldridge* test to the facts of this case is set forth in a separate section of this brief.

Fuentes held that three elements must exist for a seizure without prior hearing to be constitutionally permissible:

1. The seizure must be "directly necessary to secure an important governmental or general public interest."
2. There must be "a special need for very prompt action."
3. The person initiating the seizure must be "a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U.S. at 91.

All three elements must exist for a court to approve a seizure without prior notice and hearing. *Id.*

In *Calero-Toledo v. Pearson Yacht Co.*, 416 U.S. 663 (1974), the court held that a yacht could be seized in a drug forfeiture case by Puerto Rican authorities without a prior hearing because the seizure met the *Fuentes v. Shevin* criteria. 416 U.S. at 677-680.

The present case differs from *Calero-Toledo* on each of the criteria.

1. The "important governmental interest" found by the *Calero-Toledo* court was that seizure was necessary to enable the government to obtain *in rem* jurisdiction. A yacht owner could use the delay afforded by pre-seizure notice and hearing to abscond with the *res* and prevent *in rem* jurisdiction from ever attaching. With real property, in contrast, the owner cannot remove the *res*; it will continue to be available for seizure after a hearing.

The *Calero-Toledo* court explained that "seizure under the Puerto Rican statutes serves significant governmental interests: seizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings." 416 U.S. at 679.[1] The footnote to the passage just quoted also demonstrates that asserting jurisdiction was the important interest: "*Cf. Ownbey v. Morgan*, 256 U.S. 94 (1921), cited with approval in *Fuentes v. Shevin, supra*, 407 U.S. at 91, n. 23, 92

[1] In the same passage, the *Calero-Toledo* court then stated that forfeiture will foster "the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." The court could not have meant that these goals permitted the government to dispense with a hearing, because they could have been achieved as well after a hearing: rather the court meant that prehearing seizure was justified to establish jurisdiction over the property so that the ultimate goal of forfeiture could be achieved.

S.Ct. at 1999." *Fuentes* cited *Ownbey* as a case which "involved attachment necessary to secure jurisdiction in state court — clearly a most basic and important public interest." *Fuentes* at 92 n. 23.

In the case of real property, *in rem* jurisdiction over the property itself can always be obtained after giving the owner a hearing to contest the seizure.[2]

Even after a hearing, the government can eventually obtain *in rem* jurisdiction over a real property *res* for forfeiture under 21 U.S.C. §881(a)(7) simply by posting the property and leaving a copy of the process with the occupant. 21 U.S.C. §881(b); Rule E(4), Supplemental Rules for Certain Admiralty and Maritime Claims; *United States v. TWP 17 R 4, Certain Real Property In Maine,* 970 F.2d 984, 989 (1st Cir. 1992). Jurisdiction over the *res* can be established without search, entry into the home, or other interference with the owner's or occupant's rights. *Id.*

21 U.S.C. §881(b) provides: "[a]ny property subject to civil forfeiture under this subchapter may be seized by the Attorney General under process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property."

Rule E(4)(b) of the Supplemental Rules provides that in executing process:

[2] An executive branch seizure is not necessary before the filing of the complaint in a forfeiture case under 21 U.S.C. §881(a)(7). See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶9.01[2] at p. 9-6 (1992). The government had an *ex parte* hearing before seizing Good's home; there is no jurisdictional reason it could not have a hearing with parties present.

> If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent.

Surely, it is "impracticable" to take a dwelling and four acres of land into "actual possession." Except for fencing the property or hiring a guard — actions which the government would surely argue are unnecessary and impractical — the government could scarcely do more to "seize" unimproved real property than to post the process. If posting is sufficient to execute process and "seize" unimproved real property, it should also be sufficient to "seize" improved real property, such as Good's. The real property itself, of course, is always within the court's territorial jurisdiction, unlike a yacht or other moveable property.

In *United States v. TWP 17 R 4*, the court held that, at least for undeveloped real property, no more than posting is necessary for jurisdiction to attach. The government has agreed in Good's case that warrants of arrest *in rem*, which provide "the most minimally intrusive means by which forfeiture jurisdiction may be established over the real property," are "sufficient to establish the court's jurisdiction over the property." Petition for Rehearing with Suggestion for Rehearing *En Banc* at 15, n. 24. The government also agrees that a warrant of arrest may "in some circumstances be served simply by posting it on the premises without further seizure," Brief for the United States at 12, n. 5; and that "at least in some circumstances, a court may acquire bare jurisdiction over the defendant real property simply through issuance and service of an *in rem* warrant of arrest," Brief for the United States at 28, n. 18.[3] Thus, "seizure" of a real

[3] The government does argue, somewhat inconsistently, that "seizure ordinarily would be necessary for the court to acquire and exercise meaningful custody over the premises and to ensure against its continued use for illegal purposes." (Brief for United States at 28, n. 18.) However, once jurisdiction is established, it could not be defeated by removal or destruction of the *res*, *Republic National Bank of Miami v. United States*, 113 S.Ct. 554, 559 (1992), and *a fortiori*, could not be defeated by illegal use of the property by an occupant. *Republic National Bank* states that "a valid seizure of the *res* is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding," 113 S.Ct. at 557, but does not discuss the extent of seizure necessary, or suggest any jurisdictional reason a hearing could not be held before seizure.

property *res* may be accomplished in a manner far less intrusive than that employed in this case, and there is no need for concern that delaying the seizure until after a hearing will lead to the disappearance of the *res*. The significant governmental interest in establishing jurisdiction can be achieved without violating due process rights.

2. The next point made by the *Calero-Toledo* court was that "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized — as here, a yacht — will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679.

This corresponds to the second *Fuentes* element, "a special need for very prompt action." 407 U.S. at 91.

The government argues that if a hearing is held before seizure:

1. The property might be destroyed;
2. Its contents might be concealed, and they might be forfeitable "if used in, or the proceeds of, a drug transaction;"
3. Seizing agents might be endangered if the owner or occupants are tipped off in advance; and

4. The owner might use a hearing to obtain civil discovery. Brief for the United States at 29-30.[4]

These assertions are really the nub of this case. If they are illusory or insubstantial they cannot outweigh the other factors under the *Mathews v. Eldridge* balancing test discussed below, and cannot establish the "prompt action" element of *Fuentes*.

The government's own practices demonstrate it has no real concern that an owner will destroy the property rather than have it fall into the government's hands: as a matter of course, the occupant is allowed to remain in possession pending final action. See Brief for the United States at 13, fn. 6.[5] In the present action, Good's tenants were allowed to remain, and Good would have been allowed back. A disgruntled owner would have as much opportunity to destroy the property after an *ex parte* seizure as the owner would before a pre-seizure hearing. To be sure, the United States requires the occupant to promise that the property will be kept in good condition, but whatever prophylactic effect such an admonition alone might have could easily be duplicated by including an order to that effect in the warrant of arrest. (An *ex parte* temporary restraining order forbidding the owner to destroy the property would not be objectionable on due process grounds.) Even dispossession of the owner does not guarantee the property would not be destroyed — a determined owner could sneak back and destroy the building unless it were kept under guard, which is not the government's practice.

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[4] None of these concerns were presented in the government's briefs to the Ninth Circuit or to the district court. They are raised here for the first time and the court should not consider these *post hoc* excuses now.

[5] The government's policy has apparently not always been so benign. See *United States v. Property at 850 S. Maple*, 743 F.Supp. 505 (E.D. Mich. 1990) (mother and two children evicted from apartment, allegedly at gunpoint, during marshal's seizure after others had allegedly sold cocaine from the apartment.)

In this case, of course, Good has shown no desire to destroy his property: he has struggled in the judicial system for more than three years to get it back.

Finally, if the owner does destroy his or her own property, one purpose of forfeiture urged by the *amici curiae* attorneys general is still intact: the continued use and enjoyment of the property by the supposed malefactor is at an end. Indeed, self-destruction will strip the offender of his or her assets more swiftly than judicial proceedings.

The government claims that the *Calero-Toledo* court, by saying that property subject to forfeiture "will often be of a sort" that can be removed, concealed, or destroyed, created a generic forfeiture exception to the normal requirement of a pre-seizure hearing that applies even if the property cannot be removed, concealed, or destroyed. There is no reason that this court should create a legal rule severed from its underlying rationale and "override common sense." *Republic National Bank of Miami v. United States*, 113 S.Ct. at 559.

The government's next argument is that the contents may be forfeitable "if used in, or the proceeds of, a drug transaction." This fails because the government never alleged that the contents of Good's home constituted drug proceeds[6] and never sought forfeiture of the personal property contents. The government did not bring this action under any of the subsections of 21 U.S.C. §881(a) authorizing forfeiture of personal property.

Again, the government's willingness to allow occupants to remain belies any concern over the fate of the contents. The occupant can easily conceal contents after seizure if he or she is allowed to remain.

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[6] State authorities did forfeit a portion of the cash found in the home as drug proceeds.

The government next argues that seizing agents may be endangered if the owner has advance notice. The government offers no empirical evidence for the general proposition that it is more dangerous for agents to seize a home after the owner has been given an opportunity to oppose the seizure in court than it is to suddenly appear without warning. It is at least as likely that the owner will make the rational decision — to submit to lawful authority — if the owner has had time to reflect upon the likely consequences of armed resistance. Certainly agents are in some danger when they attempt to seize property *without* warning: guns are everywhere and it is possible that an occupant may react violently to an intrusion, perhaps mistaking it for criminal action. For this reason, seizure without warning creates a serious hazard for the occupant. In the absence of any empirical evidence that seizure without warning is safer than seizure after a hearing, the court should not base a constitutional decision upon this argument.

Under the circumstances of the case at bar, the government cannot argue that a violent reaction from Good was a real likelihood. He had served his probation without criminal incident for four years after the 1985 offense, he had surrendered peaceably when he was originally arrested in 1985 (R. 29, Ex. "I"), and he had no history of violence (R. 33, Ex. "A"-"B").

If the government had specific evidence that a pre-seizure hearing would place agents in danger, these facts, if properly presented to a magistrate, might constitute exigent circumstances allowing the magistrate to issue an *ex parte* warrant. No such facts were presented in this case, nor do they appear anywhere on the record.

The government finally argues that a claimant might use the pre-seizure hearing to obtain discovery, including the names of informants. Any hearing would be under the control of the court, and the court could recognize applicable privileges, such as the governmental informant privilege. At any rate, the

claimant is entitled to discovery after appearing and filing a notice of claim under the Federal Rules of Civil Procedure, which apply to forfeiture actions. The pre-seizure hearing does not create a potential for discovery; that potential already exists. If the government is concerned that civil discovery may prejudice a pending criminal case, it may file, and stay, the civil forfeiture. 21 U.S.C. §881(i); *United States v. James Daniel Good Real Property*, 971 F.2d 1376, 1382 (1992). There is no indication in the Ninth Circuit's opinion that the scope of what may ultimately be discovered is expanded by allowing a pre-seizure hearing.

3. The third *Fuentes* factor considered by the *Calero-Toledo* court was whether the search was initiated by a "government official responsible for determining, *under the standards of a narrowly drawn statute*, that it was necessary and justified in the particular instance." 416 U.S. at 678, citing *Fuentes*, 407 U.S. at 91 (emphasis added).

Whatever might be said about the statute involved here, 21 U.S.C. §881(a)(7), it cannot be claimed that it is "narrowly drawn." The language that any real property may be forfeited "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of," a felony drug crime, is extremely broad and vague, and easily lends itself to abuse. See *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992) ("[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes);" *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1265, 1270 (2d Cir. 1989) (suggesting that 21 U.S.C. §881(a)(7) would appear to allow the forfeiture of the 800,000 acre King Ranch if drugs were sold in a shed on the ranch); *United States v. One Parcel of Real Property Located at 508 Depot Street*, 964 F.2d 814, 818 (8th Cir. 1992) ("we are troubled by the government's view that any property, whether

it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in single drug transaction"), *cert. granted sub. nom. Austin v. United States*, 113 S.Ct. 1036 (1993) (No. 92-6073).

As it has been applied, 21 U.S.C. §881(a)(7) is an extraordinary extension of the reach of *in rem* civil forfeiture. Originally, *in rem* forfeiture rested upon the "personification" fiction. *J. W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510-511 (1921). The fiction was typically applied to objects which could reasonably be considered the instrumentalities of crime, or the means by which crimes were committed, or which were contraband in themselves:

> "The thing is the instrument of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus, goods found smuggled... prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation. A ship entering the mouth of a blockaded port furnishes by its position evidence of its intention to break the blockade, and the decree of condemnation follows." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 321-322 (1871) (Field, J. dissenting)

Any logical force this doctrine might have had when applied to contraband, ships caught running a blockade, or to the common-law deodand (the actual instrument causing death) is at best severely attenuated when the doctrine is extended — as it has been under 21 U.S.C. §881(a)(7) — to forfeit large tracts of land which have no connection with crime other than being the location where a drug transaction occurred. *See, e.g., United States v. Santoro*, 866 F.2d 1538 (4th Cir. 1989) (four sales of cocaine totalling 12.8 grams sufficient for forfeiture of

acres of property, including a home); *4492 South Livonia Road* (forfeiture of 120 acre farm with house and two barns upon proof of two cocaine sales, plus drug paraphernalia, and small amounts of cocaine and marijuana on the premises.) Even the laws allowing forfeiture of real property associated with distilleries, which appear to include all of the earlier cases involving real property forfeitures, limited the forfeiture to the property connected with the distillery itself. *United States v. Reynolds*, 856 F.2d 675, 677 (4th Cir. 1988). 21 U.S.C. §881(a)(7) is so broad that courts have required a "substantial connection" between the illegal activity and the real property. *United States v. Parcel of Land & Residence at 28 Emery Street*, 914 F.2d 1 (1st Cir. 1990). Questions also arise concerning the extent of a tract that is subject to forfeiture, *United States v. Tax Lot 1500*, 861 F.2d 232 (9th Cir. 1988), *cert. denied* 493 U.S. 954 (1989), or whether more than one tract is involved. The factual circumstances under which a parcel of real property may be considered to have been used to facilitate the commission of a crime are far broader than the statutory grounds in *Calero-Toledo*, which limited forfeiture to vessels used to transport controlled substances.

This court should also reconsider the statement in *Calero-Toledo* that governmental forfeitures are less suspect because they are "not initiated by self-interested private parties." 416 U.S. at 679. This forfeiture, like many others today, was initiated by a self-interested *public* party. The DEA may share in the proceeds of forfeiture, and proceeds may be rebated to local authorities. 21 U.S.C. §881(e). This governmental incentive provides a special temptation for abuse. *Harmelin v. Michigan*, 111 S.Ct. 2680, 2693 n. 9 (1991) (Scalia, J.) ("it makes sense to scrutinize governmental action more closely when the State stands to benefit").

None of the three elements found essential by the *Fuentes* and *Calero-Toledo* courts exist in Good's case. *Calero-Toledo* was a very different case, and the results should differ as well.

Stare decisis does not require this court to hold that seizure of a home is the same as the seizure of a yacht. *Calero-Toledo* itself made no claim to a holding beyond its own facts: "In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." 416 U.S. at 679-680.

When *Calero-Toledo* was decided, real property forfeitures had been rare, arising generally in distillery cases dating from the 1930's and earlier. The *Calero-Toledo* court could not be charged with anticipating the vast expansion of real property forfeitures that occurred after the enactment of 21 U.S.C. §881(a)(7) ten years later in 1984, and the decision does not control a case with fundamentally different facts. *Accord*, *4492 South Livonia Road* (hearing required before seizure of a home, distinguishing *Calero-Toledo* on the grounds that it involved moveable property); *Richmond Tenants Organization v. Kemp*, 956 F.2d 1300, 1307-1308 (4th Cir. 1992) (same); *United States v. A Parcel of Land, Appurtenances, and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3rd Cir. 1991) (same), *aff'd on other grounds*, 113 S.Ct. 1126 (1993); *Department of Law Enforcement v. Real Property*, 588 So.2d 957, 965 (Fla. 1991) (due process guarantees in Florida State Constitution require adversarial hearing before any restraint on real property in forfeiture cases other than a *lis pendens*.)

The other forfeiture case primarily relied upon by the government — *United States v. $8850* — is also easily distinguishable from the case at bar. In *$8850*, a customs inspector seized cash at a border search. The claimant did not argue that a hearing was necessary before seizing the cash, but the court, in *dicta*, went on to discuss why it was not. Citing *Calero-Toledo*, the court stated that a requirement to conduct a hearing before seizing items subject to forfeiture "would make customs processing entirely unworkable." 461 U.S. at 562 n. 12.

The decision in *$8850* is easy to understand. Customs agents cannot be expected to summon a magistrate to conduct a hearing every time they find contraband. The *res* was easily moved or hidden; if it were not seized, forfeiture could not even have been instituted without the owner's cooperation. The concern that removal of the *res* might prevent a forfeiture action from being initiated *never* applies in a real property forfeiture.

C. Under the *Mathews v. Eldridge* Test, An Adversarial Hearing Was Required Before Seizure.

In *Mathews v. Eldridge*, the court set out a general three-part balancing test for cases in which an individual claims that the government's failure to provide a pre-deprivation hearing violates due process.

The court must consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

Mathews v. Eldridge involved the termination of social security benefits. Prior to termination, the agency provided "elaborate" procedures, 424 U.S. at 339, and the claimant actually had both notice and the opportunity to provide evidence to the decisionmaker prior to the initial denial of benefits. Under those circumstances, a full evidentiary hearing was not needed before termination. 424 U.S. at 349.

1. On the first *Mathews* factor, Good unquestionably suffered a significant property deprivation by the seizure of his home. He lost his right to receive rents, his right to enforce the tenant's obligations to maintain the dwelling, (see Hawaii Rev. Stat. §521-51), and his right of reasonable access to the premises to inspect and ensure proper use (see Hawaii Rev. Stat. §521-53). Good lost his right to re-enter at the end of the lease term. The fact that the government allowed Good's tenants to remain, at its sufferance, does not eliminate the fact that the seizure was a significant infringement. *See 4492 South Livonia Road* at 1265. Good was restrained from transferring the property. Finally, although Good was not living on the property at the time of the seizure, it was still his home, not a commercial rental, and entitled to at least a measure of the heightened respect — even "sanctity," *Payton v. New York*, 445 U.S. 573, 601 (1980) — that the home traditionally enjoys in the law. Although he was temporarily abroad, he stayed at his home on return visits to Hawaii.

In short, the seizure took away every property right Good enjoyed in four acres of land and his home, except the right to make a claim for their return.

At the time of the seizure, Good's salary as a charity worker was $100.00 per month, as well as room and board (R. 33, Ex. "C", p. 33); the rental payments were a significant source of income to him, a factor which must be considered in the balancing test. *Mathews v. Eldridge*, 424 U.S. at 342-343.

The deprivation suffered by Good was considerably more severe than those recognized as significant by this court in other cases where it has held that due process required prior notice and hearing. In *Connecticut v. Doehr*, 111 S.Ct. at 2113, the court held that a simple attachment of real property is a significant deprivation, and held that the failure to provide for an adversarial hearing before the attachment violated the Due Process Clause. In *Fuentes*, the private owners' loss of a stove,

a stereo, a bed, a table, and other household items, 407 U.S. at 70-71, was deemed significant enough to require a preseizure hearing. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J., concurring) (some form of notice and hearing is required before a deprivation of a property interest that "cannot be characterized as *de minimis*.") Good lost his home and four acres of land.

2. The second *Mathews* factor focuses on the risk of an erroneous deprivation given the procedures actually used, as well as the value of additional safeguards. The analysis in *Mathews* looked at social security disability cases generally, not just the case involving the particular claimant. In exercising the *Mathews* balancing test, the court must consider the risk of erroneous deprivations generally, not just the strength or weakness of the government's claim in this particular case. The fact that the government might ultimately prevail after a hearing does not excuse a due process violation. As the court said in *Fuentes*, "[i]t is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing." 407 U.S. at 87. "[T]he right to a hearing does not depend upon a demonstration of certain success." *Cleveland Board of Education v. Loudermill*, 470 U.S. at 544.

A hearing is an important safeguard: "fairness can rarely be obtained by secret, one-sided determination of facts and rights ... [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring); *cited in Connecticut v. Doehr* at 2114.

In *Mathews*, the court's ultimate decision that no adversarial hearing need be held prior to termination of benefits relied largely on the pre-deprivation procedures available to the claim-

ant: he received advance notice, he could review all information relied upon by the agency, he could offer written submissions of evidence, and he could review and challenge the preliminary decision, before the actual termination of benefits. 424 U.S. at 344-346. None of these safeguards exist in a forfeiture case.

The *ex parte* hearing by the magistrate, who reviews only hearsay materials submitted by the government, is no substitute for an adversarial hearing. In *Connecticut v. Doehr*, the court held that the fact that the challenged procedure had an *ex parte* judicial determination of probable cause prior to attachment did not give sufficient protection against an erroneous deprivation. 111 S.Ct. at 2114.

The government argues that an adversarial hearing would add nothing because the government must only demonstrate probable cause to forfeit the property, which can be determined in an *ex parte* proceeding. Brief for the United States at 32-33. This argument actually shows why it is important that an owner be afforded a pre-seizure adversarial hearing, because it ignores the possibility of "innocent owners." In many real property cases, there will be owners who had no knowledge of the illegal activities. For example, the property may have been rented to a person using it for criminal activities, without the owner's knowledge, or there may be a lienholder with no knowledge of the illegal use. Probable cause may exist to forfeit the property, but an innocent owner who cannot contest the seizure certainly suffers an "erroneous deprivation." *United States v. Leasehold Interest at 121 Van Nostrand Ave.*, 760 F.Supp. 1015, 1029 (E.D.N.Y. 1991) (Weinstein, J.) (occupant should be given opportunity at hearing before eviction to prove innocent ownership.)

Under the present procedure of seizure without a hearing, an innocent owner has no way to protect his or her rights before the seizure.

There is also no adequate remedy following seizure. Under the federal rules of civil procedure, there seems to be no provision for a claimant to challenge the seizure before a trial on the merits, except for a motion for summary judgment or a motion to dismiss. 1 D. Smith at ¶10.05[10], p. 10-72.17. Fed.R.Crim.P. 41(e), which allows a claimant to have an evidentiary hearing when property is seized in a criminal case, does not apply in a civil forfeiture case. Fed.R.Crim.P. 54(b)(5); *United States v. Price*, 914 F.2d 1507, 1510 (D.C. Cir. 1990). Under Rule E(4)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims, a prompt post-seizure hearing must be provided, *except* for forfeiture actions brought by the United States.

The government could remain in control of the property, dispossessing the claimant, until the end of trial, as long as it had a case strong enough to survive summary judgment or a motion to dismiss, even if the claimant had a strong enough case on the merits to ultimately prevail at trial.

Even if it were available, the post-seizure hearing would not eliminate the due process concerns. *Fuentes* at 84-85; *Connecticut v. Doehr; United States v. Leasehold Interest at 121 Van Nostrand Ave.*

Turning to the case at hand, Good certainly had arguable claims — his timeliness argument convinced a Ninth Circuit panel; his Double Jeopardy argument was at least troubling to the district court judge who ordered forfeiture (Transcript of Proceedings, December 4, 1990), and it still cannot be said that the government will finally prevail.

There is ample evidence that the safeguard provided by an adversarial hearing may prevent unjustified deprivations in real property forfeiture cases. *See, e.g., United States v. Leasehold Interest at 121 Van Nostrand Ave.* (lessee whose eviction had been sought by government found to be innocent owner after

adversarial hearing); *United States v. Real Property Located at 110 Collier Drive*, 793 F.Supp. 1048, 1051 (N.D. Ala. 1992) (government persuaded court to order forfeiture of home by not disclosing that the quantity of marijuana involved would not establish a felony violation; court reversed its order, calling proceedings a "travesty of justice"); *United States v. Real Property Located at 623-636 Ninth Ave.*, 798 F.Supp. 1540, 1546 (N.D. Ala. 1992) (court criticized government for seizing rental home without investigating guilt of owner who proved to be an "innocent owner" ten months after seizure).

A real property forfeiture case requires the application of a vague and sweeping statute. It can scarcely inspire confidence that probable cause in a forfeiture proceeding may be proven by hearsay, *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1287 (9th Cir. 1983), inadmissible in virtually any other kind of civil or criminal case.

The forfeitability of a parcel is not always the open-and-shut case that the government seems to think. Sometimes the government errs in its interpretation of the law. Earlier this term, the court rejected the government's views on the scope of the "relation back" doctrine and the "innocent owner" defense in forfeiture cases. *United States v. A Parcel of Land, Appurtenances, and Improvements Known As 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993). Providing an adversarial hearing reduces the possibility that the government will seize the property of innocent owners, *United States v. Leasehold Interest at 121 Van Nostrand Ave.*, that it will seize property when the necessary criminal activity has never occurred, *United States v. Real Property at 110 Collier Drive*; that it will seize property without sufficient nexus to criminal activity, *United States v. Parcel of Land & Residence at 28 Emery Street*; or that it will seize a tract of land beyond that involved in the criminal activity. The Due Process Clause's guarantee that the individual can argue his or her case to a judge serves as a small but significant check against governmental error.

3. The final *Mathews* factor to be considered is the government's interest in avoiding a hearing. 424 U.S. at 335. In *Mathews*, the inquiry focused on the cost and inconvenience to the government.

The disadvantages of affording a hearing argued by the government in this case — that the property might be concealed or destroyed; that seizing agents might be endangered; and that the owner might use the hearing to obtain discovery — were all analyzed earlier in this brief, during the discussion of *Calero-Toledo*, and demonstrated to be insubstantial.

In addition, *amici curiae* attorneys general argue that "the need to control the illicit drug industry stands on equal footing with the government's need to confiscate contaminated food or illicit drugs," (Brief for Amici at 6-7), citing *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (mislabeled drugs) and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (contaminated food). The analogy to these older cases is inapt. If Good's home were in itself a threat to public safety, like contaminated food or mislabeled drugs, or if the government proved that exigent circumstances existed which required immediate seizure to prevent continued crime, *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) *cert. denied* 111 S.Ct. 1017 (1991), the balance would tip against a pre-seizure hearing. A search warrant can always be obtained *ex parte* when there is probable cause that a felony drug crime is being committed in a dwelling, or that probable cause exists to find evidence of a crime. The government has never contended that Good's home was used, or intended to be used, for illegal purposes at the time of seizure some fifty-four months after the discovery of marijuana on the premises. The government's willingness to allow Good's tenants to remain also showed it had no real concern about the property being used for drug transactions. *United States v. Property at 850 South Maple* at 511.

Amici also argue that "the decision to seize an urban crack house or a rural drug lab without prior notice ... is best left to the discretion of law enforcement officers." (Brief for Amici at 9.) Again, if probable cause of ongoing drug activity exists, an *ex parte* search warrant can authorize seizure of contraband, instrumentalities of a crime, and evidence; and the *Good* decision can be affirmed on this point while leaving open the possibility that the government could obtain an *ex parte* warrant to seize premises where exigent circumstances truly exist — such as the dealer-infested apartment building in *United States v. 141st Street Corp.*

The administrative burdens of a rule requiring a pre-seizure hearing would be slight, especially when it is considered in relation to the value of the property, which is likely to be large when real property is involved. While real property forfeitures may now be fairly common, they are surely far less numerous than the social security determinations in *Mathews*. The government has not argued that a court hearing at the outset of a real property forfeiture involving a dwelling would be an intolerable burden on its attorneys or the courts.

In short, the *Mathews v. Eldridge* balancing test strongly supports honoring Good's right to a hearing before seizure.

As the government correctly notes, 21 U.S.C. §881(b) authorizes seizures of real property without prior notice, hearing, or judicial review. Under the Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims, an *ex parte* judicial review must be held before seizures, *except* for forfeitures brought by the United States. While the government did have an *ex parte* hearing in Good's case, as discussed above, the *ex parte* hearing did not cure the constitutional defect because Good still had no notice or opportunity to be heard. This court should therefore hold that 21 U.S.C. §881(b) is unconstitutional as applied to the seizure of Good's home.

D. The Fourth Amendment Is Not the Source of the Minimum Requirements for Governmental Takings of Private Property.

The bulk of the government's brief is devoted to a novel proposition, never explicitly endorsed by any cited opinion: that when the government seizes property "for law enforcement purposes (including forfeiture)," Brief of United States at 25, the Fourth Amendment controls, and due process requires no procedures beyond those contained in the Fourth Amendment. Nothing more than an *ex parte* warrant approved by a magistrate based on probable cause, and stating with particularity the things to be seized, would ever be required to seize property "for law enforcement purposes."

The government's proposed rule would mean that the government could always dispense with prior notice and an opportunity for a hearing — the "root requirement" of the Due Process Clause, *Boddie v. Connecticut*; *Cleveland Board of Education v. Loudermill* — when it seized property "for law enforcement purposes," no matter how strong the owner's interests or how weak the government's need for prompt action.

The government's Fourth Amendment proposal contradicts the history and purposes of both the Fourth and Fifth Amendments, and the very language of the Fourth Amendment itself.

1. The Framers created the Fourth Amendment to protect privacy rights, not to set forth a procedural guide for the seizure of property. It was intended to safeguard against "invasions of home and privacy of the citizens and the seizure of their private papers in support of charges, real or imaginary, made against them." *Weeks v. United States*, 232 U.S. 383, 390 (1914). "The basic purpose of [the Fourth Amendment,] as recognized in countless decisions of this court, is to safeguard

the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The language of the Fourth Amendment itself demonstrates that it was not intended to be the sole source of the limits on governmental seizures of real property for law enforcement or other purposes. By its terms, the Fourth Amendment does not even contemplate the seizure of real property: it authorizes warrants "particularly describing the *place* to be searched, and the *persons* or *things* to be seized." (emphasis added). It authorizes the search of a "place," but not its seizure; and the seizure of "persons" and "things," but not "places."

This language is not accidental. Governmental seizure of real property was not the evil which specifically inspired the enactment of the Fourth Amendment. The Fourth Amendment grew out of the abuses of warrants such as the English general warrant and the colonial writs of assistance, which authorized general searches by agents of the Crown enforcing British tax laws. *Stanford v. Texas*, 379 U.S. 476, 481-482 (1965). Such warrants "were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book'". *Id.* This denunciation "has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.'" *Id.*

Even the writs of assistance, despised as they were, did not permit the seizure of a colonist's home and land whenever contraband was found therein. Seizures under the early search warrants were limited in scope to stolen property, smuggled goods, and the like — "contraband, weapons, and plunder," *Zurcher v. Stanford Daily*, 436 U.S. 547, 578 (1978) (Stevens, J., dissenting): in other words, property in which the private

ownership interest was by definition insubstantial.[7] Had the colonists been subjected to a law which allowed the government to seize home and land because of the mere presence of contraband, the Framers might well have been inspired to enact some provision in the Bill of Rights specifically intended to curb the abuse.[8]

The Fourth Amendment was crafted against a known evil — arbitrary searches which interfered with privacy rights. Although it does protect property rights even when privacy concerns are absent, *Soldal v. Cook County*, 113 S.Ct. 538, 545 (1992), those protections are not its primary purpose. *Weeks v. United States; Camara v. Municipal Court.* It is a fundamental error to use the Fourth Amendment as a general guide to government takings of homes, land and other property, even in "law enforcement," when it was never intended for that purpose, and when the seizures contemplated under it were so restricted in scope.

The purpose of a Fourth Amendment search warrant is far different from that of the seizure warrant for Good's home. A search warrant's purpose is typically to "aid in the apprehension and conviction of criminals." *Fuentes* at 93 n. 30. The

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[7] The government cannot use the "relation back" doctrine to argue that Good's property interest in his home was similarly insubstantial: at most, "relation back" vests title in the government retroactively after the decree of forfeiture. *92 Buena Vista Ave.*, 113 S.Ct. at 1136. Good was the owner of his home when it was seized, and remained the owner during the forfeiture proceedings.

[8] A number of the more draconian elements of English forfeiture law were abolished by the Constitution or early statutes: bills of attainder (U.S. Const. Art. I, §9, cl. 3); corruption of the blood or forfeiture of estates for treason, except during the life of the traitor (U.S. Const. Art. III, §3, cl. 2); and forfeiture of estates or corruption of the blood for felonies (Act of April 30, 1790, 1st Cong., 1 Stat. 117, c. 9, §24, now 18 U.S.C. §3563).

Fuentes court explicitly discussed the differences between a search warrant and an attachment of property, explaining that the purpose of a search warrant — to acquire evidence of crime — could obviously be thwarted if prior notice were given. *Id.* To aid in solving crimes, a search warrant authorizes the seizure of "contraband, weapons, and plunder," *Zurcher v. Stanford Daily*, and evidence of crime. *Warden v. Hayden*, 387 U.S. 254 (1967). In contrast, the purpose of the seizure warrant here was to enable the government to take from Good all right, title, and interest to his home and four acres of land.

The Due Process Clause, on the other hand, is directly concerned with the property rights issues in this case. The "two central concerns of procedural due process" are "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Due process rules are intended to minimize unfair or mistaken deprivations of life, liberty or property "by enabling persons to contest the bases upon which the State proposes to deprive them of protected interests." *Carey v. Piphus*, 435 U.S. 249, 259-260 (1978).

That the Fourth Amendment does apply to seizures of property, *Soldal v. Cook County*, does not eliminate the role of the Due Process Clause. "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's dominant characteristic. Rather, we examine each constitutional provision in turn." *Soldal v. Cook County*, 113 S.Ct. at 548. In *Soldal*, the court refused to ignore the Fourth Amendment when the Due Process Clause could also have been applied. This court should not be persuaded to ignore its unwavering teaching that notice and an opportunity to be heard are the very core of the Due Process Clause by the government's argument that the Fourth Amendment, in other

contexts, provides lesser protection.

2. It is at best ironic that the government argues that the Fourth Amendment controls seizures for "law enforcement purposes" and cites *Gerstein v. Pugh*, 420 U.S. 103 (1975) to the effect that the Fourth Amendment controls searches and seizures in "criminal cases." (Brief for the United States at 25.) The government argued to the courts in the proceedings below that the seizure of Good's home was "civil" and "remedial," not "criminal" and "penal." (R. 37; Answering Brief in Ninth Circuit.) The government has consistently argued in other cases — with some success — that forfeiture actions denominated as "civil" by Congress, like 21 U.S.C. §881(a)(7), should not be treated as "criminal" by the courts. Thus, the government has successfully argued that forfeiture under 21 U.S.C. §881(a)(7) is "civil" and "remedial," not criminal, for the "dual punishment" aspect of the Double Jeopardy Clause, *United States v. Santoro*; and persuaded the court that a forfeiture action after a criminal acquittal was "civil," not a second criminal prosecution. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). The government made a similar argument this term in *Austin v. United States*, No. 92-6073 (Eighth Amendment proportionality).

In *Gerstein v. Pugh*, one of the cases most cited by the government, the court held that the due process clause did not impose requirements beyond those contained in the Fourth Amendment when the government seized a criminal defendant before trial. But the *Gerstein* court — in language omitted by the government's brief — also stated that "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." 420 U.S. at 125 n. 27.

A forfeiture proceeding is also "unique in jurisprudence," but in the opposite respect. As interpreted so far by the courts, it

seems designed to safeguard the government's desire to forfeit the property, not the "rights of those accused." The owner has the burden of proving the property's innocence, 19 U.S.C. §1615; with occasional statutory exceptions, the owner's innocence is no defense, *Calero-Toledo*; the government's ultimate burden of proof is only probable cause, 19 U.S.C. §1615; the "probable cause" burden is less even than a "preponderance of evidence" — the government must establish only "reasonable grounds, rising above mere suspicion," *4492 South Livonia Road*, 889 F.2d at 1267; the government can use rank hearsay, *United States v. One 56-Foot Motor Yacht Named Tahuna*; but the claimant cannot, *United States v. $2500 in United States Currency*, 689 F.2d 10, 16 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979).[9]

The taking of Good's property had only a tangential relationship to law enforcement. It did not prevent the use of property for crime any more than taking anyone else's property. The only conceivable law enforcement objective served by the seizure was the punishment of Good. Applied to the facts of this case, the government's new rule is nothing more than a claim that the due process requirements of notice and a hearing never apply when the government wishes to take property to punish a wrongdoer.

Seizure of Good's real property is not even authorized under present criminal procedure. Fed.R.Crim.P. 41(b), which governs "all possible steps in the criminal case from its inception to judgment and sentence," *United States v. Choate*, 276 F.2d 724, 727 n. 27 (5th Cir. 1960), authorizes the search for

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[9] Not all of the procedures cited in the preceding paragraph have received this court's final blessing, and respondent does not concede that they should all pass constitutional scrutiny. Nonetheless, the paragraph accurately describes civil forfeiture law as practiced in the federal courts.

and seizure of:

> 1. property that constitutes evidence of the commission of a criminal offense; or
> 2. contraband, the fruits of a crime, or things otherwise criminally possessed; or
> 3. property designed or intended for use or which is or has been used as the means for committing a criminal offense. Fed.R.Crim.P. 41(b).

Under the facts of this case, Good's home and four acres of land could not be seized under Fed.R.Crim.P. 41(b): they are not "the means for committing a criminal offense," and they fit in no other category.

3. The government also relies heavily on *United States v. Monsanto*, 491 U.S. 600, 615 (1989), where the court stated that assets, including a home, could be "restrained" pending trial, based on probable cause, when the owner was allowed to remain in possession. *Monsanto* does not help the government: because there had been a full evidentiary hearing, the court expressly stated that it did not reach the question whether such a hearing was required before a seizure. 491 U.S. at 615 n. 10. The *Monsanto* court's analogy to the "restraint" of a person pending trial, "where there is a finding of probable cause to believe that the accused has committed a serious offense," citing *Salerno v. United States*, 481 U.S. 739 (1987), actually indicates that an adversarial hearing must be held to restrain property pending trial. *Salerno* involved the constitutionality of the Bail Reform Act, and the finding of "probable cause" in *Salerno* was made, as required by the Bail Reform Act, only after a full adversarial hearing. 481 U.S. at 742.

In addition, the restraint in *Monsanto* was only a restraint on the owner's ability to alienate the property, pending a criminal forfeiture trial. 491 U.S. at 615. The government had prevented Good from alienating his property by the filing of a

"Notice of Pendency of Action" on the day the complaint was filed. *See* Hawaii Rev. Stat. §501-151. Further seizure to prevent alienation was unnecessary.

4. In the two cases in the last quarter-century where this court considered due process issues in connection with forfeiture — *Calero-Toledo* and *$8850* — the court rejected, at least by implication, the government's Fourth Amendment argument. In *Calero-Toledo*, the court engaged in an explicit balancing analysis to justify the seizure without a hearing, following *Fuentes v. Shevin*. The entire analysis would have been unnecessary if the Fourth Amendment simply made notice and a hearing superfluous.

In *$8850*, the court found it necessary to explain why no hearing was required by due process before the initial seizure by referring to the impracticality of such a hearing, again applying the *Fuentes* test. 461 U.S. at 562 n. 12. To justify the continued possession by the government after the initial seizure without a hearing, the court again applied a balancing test. 461 U.S. at 563-571.

5. The government does not attempt to sketch the outer limits of its proposed rule, but it would be irresponsible to discuss its shortcomings from the standpoint of legal history and precedent without also pointing out where its adoption would necessarily lead.

To take but one example: under the government's rule, U.S. marshals could march into the home of a family which had utterly no knowledge of or involvement in crime, and force them immediately into the streets, with no prior notice or hearing, as long as a magistrate had issued a warrant finding probable cause that the property had at some time been used in some way which justified forfeiture. While the government's present policy is not to dispossess occupants, under the government's rule, the *Mathews v. Eldridge* balancing test

would not apply, and the severity of the owner's loss would be irrelevant. Although an "innocent owner" exception presently exists under 21 U.S.C. §881(a)(7), there appears to be no constitutional prohibition against Congress or a State legislature enacting a law that would forfeit property of innocent homeowners, as they have for other kinds of property (at least according to *Calero-Toledo*). At any rate, an innocent owner cannot forestall the initial seizure under the *ex parte* procedure presently employed by the government.

The foregoing example is not a strawman. 21 U.S.C. §881(b) says the government may do exactly what has just been described (and does not even require the magistrate's ruling). The innocent owner can be dispossessed until trial on the merits, unless his or her case can be proven by undisputed facts on summary judgment. The only thing which would prevent the foregoing from passing constitutional scrutiny is this court's adherence to the "root requirement" of the Due Process Clause and rejection of the government's Fourth Amendment argument.

The new rule proposed by the government has an immense scope. Virtually everything done by the Executive Branch in the domestic sphere can be termed "law enforcement," whether civil or criminal. Presently, more than a hundred federal statutes authorize civil forfeiture, 1 D. Smith, ¶1.02 at 1-27, and innumerable federal statutes contain criminal penalties. The forfeiture program already has a vast scope. At the end of FY 1990, the Department of Justice had an inventory of seized property worth more than $1.3 billion, including 3,800 real properties. 1 D. Smith, ¶1.02 at 1-21.

The government is here proposing an extraordinary expansion of its power: to expel the Due Process Clause from forfeiture law, and to also expel it from a vastly wider, though still dimly defined realm of governmental takings.

E. Good Should Be Awarded the Back Rent If He Prevails on the Due Process Issue.

The government never offered any argument in the lower courts against Good's claim for his back rent if the seizure was found illegal. It did not offer any argument in its opening brief to this Court against the Ninth Circuit's award of those back rents, and did not cite this aspect of the decision as an error in its petition for a writ of certiorari. The government must be held to have waived any opposition on the point. *Bogle v. Scheer*, 512 So.2d 1336, 1337 (Ala. 1987) (issues not raised in appellant's brief are waived). It would hardly be appropriate for the government to raise the issue for the first time in its reply brief, when respondent will have no chance to answer.

If this court affirms that the seizure without prior hearing was invalid, it should also let stand this part of the judgment below. To hold otherwise would leave Good with no remedy for the unlawful seizure, and reward the government with the fruits of its unlawful action.

II. THIS ACTION MUST BE DISMISSED IF NOT TIMELY COMMENCED UNDER 19 U.S.C. §1602-1604.

A. 19 U.S.C. §1602-1604 Require Prompt Commencement of Forfeiture Actions.

The court of appeals correctly ruled that 19 U.S.C. §1602-§1604 require the government to promptly file a forfeiture complaint after learning of grounds for forfeiture. 21 U.S.C. §881(d) applies "the provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws" to forfeitures under 21 U.S.C. §881(a), except that the duties of customs officers become the duties of persons authorized or designated by the Attorney General.

Among the customs laws so incorporated are 19 U.S.C. §1602-§1604. *United States v. One 1971 BMW 4-Door Sedan*, 651 F.2d 817, 819 (9th Cir. 1981).

19 U.S.C. §1602 requires officials "authorized by law to make seizures" to "report every such seizure immediately to the appropriate customs officer." It also requires officials to "report immediately to such customs officer every violation of the customs laws."

19 U.S.C §1603(b) provides that "[w]henever ... a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney ..."

Finally, 19 U.S.C. §1604 provides that "[i]t shall be the duty of the Attorney General immediately to inquire into the facts of cases reported," and to "forthwith" cause the proper proceedings to be commenced, "without delay," if the institution of proceedings in the district court is necessary.

The significance of the reference to "judicial proceedings" being "required" is that in some cases, property may be forfeited administratively without judicial proceedings. See 19 U.S.C. §1607, §1609, §1610. At the time of the complaint in this action, property could be administratively forfeited if valued at less than $100,000. 19 U.S.C. §1607(a). (The law was amended by the Customs and Trade Act of 1990, P.L. 101-381, August 20, 1990, to raise the limit to $500,000.) The government obviously did not consider Good's property subject to administrative forfeiture. Although the language of 19 U.S.C. §1607(a) appears to require use of administrative rather than judicial forfeiture when the property is subject to administrative forfeiture, the government proceeded under 19 U.S.C. §1610, which applies when the property may not be administratively forfeited.

Good's property consisted of a large home and four acres of land (R. 29, Ex. "I" at 7-10, 84-87) worth well over $100,000, so it could not have been administratively forfeited. Therefore, judicial procedures were always necessary, and under the plain language of the statutes, should have been promptly initiated after the discovery of the violation. The government has not contended that there was ever any doubt that judicial proceedings would eventually be required to forfeit Good's property, or that any delay was caused by a need to appraise the property.[10]

The government has apparently abandoned its argument raised below that the "prompt reporting" command only addressed the duties of officials when a seizure had already occurred. In plain language these statutes also require the official "to report immediately to such customs officer every violation of the customs laws," 19 U.S.C. §1602; §1603(b); *United States v. James Daniel Good Real Property* at 1381.

The language of 21 U.S.C. §881(a)(7) also supports a requirement that forfeitures be promptly commenced. 21 U.S.C. §881(a)(7) provides that property is subject to forfeiture if it "is used, or intended to be used," to facilitate a felony drug crime. In *United States v. Tax Lot 1500*, 861 F.2d at 236 (Ferguson, J., concurring), Judge Ferguson commented that this language indicates that to institute forfeiture, there should be some current or contemplated use of the property for illegal purposes. He stated that federal forfeiture proceedings, to be timely, should be "initiated shortly after filing, but prior to termination," of state court criminal proceedings. 861 F.2d at 236.

21 U.S.C. §881(a)(7) does not provide that property is subject to forfeiture if it *had been used* for illegal purposes at some time in the past. The "used, or intended to be used"

[10] It is standing policy in the Department of Justice to initiate a judicial forfeiture action in real property cases rather than pursue administrative forfeiture. 1 D. Smith ¶6.01, at 6-2 to 6-3.

language suggests a Congressional intent that seizure and forfeiture commence when the illegal acts are discovered.

The government did not claim that Good's property was "used, or intended to be used" to commit a felony violation of Title 21 at any time after January 31, 1985, and criminal proceedings had long since been terminated. Under the concurring opinion in *Tax Lot 1500*, the property was no longer subject to forfeiture when forfeiture was commenced.

B. The Forfeiture Action Must Be Dismissed If Not Timely Commenced.

1. The government must *strictly comply* with every provision of the forfeiture laws. *United States v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1545-47 (11th Cir. 1987). Forfeiture is a "harsh and oppressive sanction," and for this reason is not favored by the law. *United States v. $31,990*, 982 F.2d 851, 856 (2d Cir. 1993); *United States v. $48,595*, 705 F.2d 909, 914 (7th Cir. 1983); *United States v. One Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982). A forfeiture should be allowed "only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226 (1939). A court should avoid declaring a forfeiture if at all possible. *United States v. One 1957 Rockwell Aero Commander*.

In this case, the reasonable, natural, and plain reading of the statute leads to the conclusion that the forfeiture is untimely. This construction of the statute enables the court to avoid a forfeiture, and it leads to a more equitable result: it prevents the further punishment of an individual who has already been punished once, four years after the criminal matter has been concluded.

Dismissal is the proper remedy for failure to follow statutory time limits in instituting forfeiture proceedings. *Lewanee*

Prosecutor v. One 1981 Buick 2-Door Riviera, 165 Mich. App. 762, 419 N.W.2d 458 (1988); *State v. Ellis*, 156 Ga.App. 779, 275 S.E.2d 361 (1980).

In *Lewanee Prosecutor v. One 1981 Buick 2-Door Riviera*, the statute required the government to "promptly" initiate forfeiture after the claimant posted bond. The court held that a four and one-half month delay violated the statute, and dismissal was the appropriate remedy because of the mandatory "shall" language in the statute. 419 N.W.2d at 460.

Governmental actions authorized by a statute must comply with all mandatory provisions of the statute or "the acts done will be invalid." *French v. Edwards*, 80 U.S. (12 Wall.) 506, 511 (1872). The promptness commands of 19 U.S.C. §1602-1604 are mandatory because they are "intended for the protection of the citizen, and to prevent a sacrifice of his property." *French v. Edwards* at 511. The use of the term "shall" in describing the duties of various governmental officials in 19 U.S.C. §1602-1604 is a "significant" indication that the language was intended to be mandatory. *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) (Cardozo, J.).

In addition, 19 U.S.C. §1603(b) was amended to add promptness language in 1978[11] and the legislative history of the amendment demonstrates that it was enacted to force the government to promptly initiate judicial proceedings for the benefit of claimants. The committee report provided that "[t]his provision will insure that a violator will have an opportunity to secure judicial review as soon as the period for administrative review has elapsed." H.R. Rep. No. 621, 95th Cong., 1st Sess., at 17 (1977). The "prompt referral" clause of 19 U.S.C. §1603(b) was therefore expressly enacted to provide protection against

[11] Customs Procedural Reform and Simplification Act of 1978, P.L. No. 95-410, §110(b), 92 Stat. 896 (1978).

arbitrary delays. Dismissal of the action is the only conceivable remedy to implement that intent.

2. The government relies on two cases, *United States v. Montalvo-Murillo*, 495 U.S. 711, 110 S.Ct. 2072, 109 L.Ed.2d 720 (1990) and *Brock v. Pierce County*, 476 U.S. 253 (1986) for its contention that even if the government breached its obligation to proceed promptly, the action should not be dismissed.

In *Montalvo-Murillo*, the court held that a delay of a few days in holding a detention hearing did not mandate the release of a prisoner. One major factor in the decision, however, was that the judiciary had an independent role in ensuring prompt hearings. The *Montalvo-Murillo* court stated that it need not invent a remedy — release of the defendant — to coerce the government and the courts to hold a timely hearing, because "[m]agistrates and district judges can be presumed to insist upon compliance with the law." 110 S.Ct. at 2079. In Good's case, there is no role for judges and magistrates in deciding when forfeiture will be commenced: this is entirely a function of the executive branch. Unless this court provides the remedy of dismissal, there is no sanction for the government's disregard of the "promptness" requirement in 19 U.S.C. §1602-1604. In any case, the government's delay of more than four years in Good's case cannot be equated to the delay of a few days in *Montalvo-Murillo*.

Brock v. Pierce County held that a 120-day limit for the Secretary of Labor to take to take action on complaints alleging misuse of grants to local governments did not prevent the Secretary of Labor from acting after that time. However, the decision rested at least in part on the fact that the aggrieved local government had a remedy under the Administrative Procedures Act if there was an undue delay: it could sue to force the Secretary to make the determination. 476 U.S. at 260 n. 7. Here, Good has no such remedy.

C. The Decision in *$8850* Does Not Control this Case.

The government argues that this court's passing reference to the five year statute of limitations in *United States v. $8850*, 461 U.S. at 563 n. 13 controls the timeliness issue.

In *United States v. $8850*, a customs agent seized *$8850* in undeclared currency from a traveler. The traveler filed a petition for remission or mitigation shortly after the seizure. After an eighteen month delay, caused primarily by a criminal investigation, the government filed a forfeiture complaint.

This court considered "a narrow" issue of due process: whether the delay between seizure and the filing of the complaint violated due process. 461 U.S. at 562.

$8850 dealt with the question whether a prompt post-seizure hearing was required by the Due Process Clause, where the pre-seizure "bright line" does not exist. *Id.* Its holding is therefore not directly applicable to this case. Good has not claimed that the untimeliness of the government's actions creates a due process violation. Rather, he is claiming a statutory violation.

Nevertheless, because the *$8850* court stated that "it could not read" a shorter time frame into the statutes, citing the express five year statute of limitations in 19 U.S.C. §1621, the government argues that this is controlling authority against the Ninth Circuit's reading of 19 U.S.C. §1602-1604. This analysis is incorrect.

As noted by the *$8850* court itself, at the time of the seizure in question, 19 U.S.C. §1603 contained no requirement of a prompt report by the Customs Service to the United States attorney for purposes of instituting forfeiture proceedings. 461 U.S. 558 n. 3. Indeed, the *$8850* court noted that "§1603 now requires the appropriate customs officer 'to report promptly' to

the United States attorney whenever legal proceedings "in connection with such seizure or discovery are required." *Id.* (§1603 was amended by the Customs Procedural Reform and Simplification Act, P.L. 95-410, §110(b), 92 Stat. 896 (1978), to add the word "promptly" to the duty of the customs officer to report to the attorney general.)

The decision in *$8850* can scarcely be controlling authority for the proper construction of a statute which is now being considered after a critical amendment.

The government also argues that the *$8850* court did not regard the promptness requirements of §1602 and §1604 as creating a shorter statute of limitations. *Id.* However, without the amendment to §1603, there is no statutory language commanding a prompt referral to the United States attorney by the customs (or DEA) agents — a necessary link in the promptness argument.

The *$8850* court did not explicitly analyze the question whether 19 U.S.C. §1602-§1604 imposed a promptness requirement. It is not clear from the opinion whether the significance of 19 U.S.C. §1602-1604 was briefed or argued. "It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have raised and considered." *United States v. Mitchell*, 271 U.S. 9, 14 (1926).

Finally, as the court of appeals correctly analyzed, 19 U.S.C. §1621 is phrased in the negative: it provides that "[N]o action ... shall be initiated ... unless commenced within five years." It does not say that a suit may be instituted at any time within five years, or that no other timeliness requirement may exist. *United States v. James Daniel Good Real Property* at 1381. *Accord, United States v. Land and Bldg. at 2 Burditt St.*, 924 F.2d 383, 385 (1st Cir. 1991) (*dicta*).

D. Public Policy Supports a "Prompt Action" Requirement.

Public policy also supports a requirement that the government promptly institute forfeiture claims. Obviously, seizure and forfeiture are most effective in preventing the continued use of property to commit crimes, or in depriving criminals of financial assets used to commit crimes, if forfeiture is promptly commenced.

Owners of property used in drug crimes would have less time to convert the property to less traceable assets through sale or mortgage. Resources would be channeled toward stripping assets from active law-breakers, rather than from those, like Good, who have completed the rehabilitation process, and have become law-abiding citizens. The government would direct its attention to current violators, and not to stale cases like Good's.

The possibility that the government may forfeit property years after the termination of criminal proceedings can only discourage an owner from investing in the improvement of the property, and may thus blight the property for years. Properties may simply fester.

If the government prevails on the due process issue raised in this case, a home that is forfeitable under 21 U.S.C. §881(a)(7) is subject to search and seizure at any time without warning. The home becomes "tainted," and the occupants — no matter who they are — have no privacy protection against governmental search. Requiring prompt action reduces the duration of such a taint.

Delay also lends itself to abuse on the part of the government. Delay tends to favor the government in a forfeiture action because the claimant has the burden of proof; delay may cause loss of evidence useful to the claimant.

The punitive character of forfeitures cannot be denied. In Good's case, the government is seizing property allegedly used in the commission of a crime more than four and a half years after the offense, when the individual involved had nearly completed probation. It is in society's interest in promoting the rehabilitation of offenders to make clear the penalties which they must face, so that the offender may discharge his obligations, and go on to a productive life. The government has made a "late hit" on Good, who must have believed that he had already been punished for the offense.

The only practical objection raised by the government to the interpretation of 19 U.S.C. §1602-1604 adopted in the *Good* decision is that it "would create incentives to investigate possible violations of the law with undue haste." Brief for the United States at 43. The Ninth Circuit's decision does not require the government to act with undue haste. The court remanded the case to the district court to develop the factual record to determine whether the government's actions were untimely. The district court and circuit court will be able to scrutinize the factual record in this and other cases to determine whether or not the government acted with due promptness.

In this case, the government waited four and a half years after the discovery of the offense to begin forfeiture proceedings, for no apparent reason. It is to be hoped that this sort of unexplained delay will rarely occur. The most obvious possible reason — the pendency of criminal proceedings or investigations — cannot possibly apply to Good's case.

The power to seize homes and other private property for drug offenses is among the most sweeping asserted by the government. To prevent abuses in the exercise of that power such as occurred in this case, the court should force the government to follow every safeguard of the individual's rights contained in the Constitution and the governing statutes. The court should make the government follow the literal commands of 19

U.S.C. §1602-1604, and void the government's seizures when it violates those commands.

CONCLUSION

The judgment of the Court of Appeals should be affirmed. DATED this 10th day of June, 1993.

Respectfully submitted.

CHRISTOPHER J. YUEN, ESQ.
Hilo Lagoon Centre
101 Aupuni Street, Suite 108
Hilo, Hawaii 96720
(808) 935-4429